No. 12499

In The United States Court of Appeals
For the Ninth Circuit

PENNSYLVANIA SALT MFG. CO., of Washington, a corporation, *Appellant*,

— VS. —

OSCAR VIRGIL HAYNES, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

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THE ARGUS PRESS, SEATTLE

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BRIEF OF APPELLEE

I. STATEMENT OF JURISDICTION

The appellee hereby refers to the Statement of Jurisdiction beginning on page 1 of the Brief of Appellant in this case, and by this reference incorporates the said Statement of Jurisdiction herein as though it were fully set out herein.

II. STATEMENT OF THE CASE

(a) Pleadings

The Statement of the Case set out in the Brief of Appellant beginning at page 2 thereof and ending at page 9, includes almost all of the essential facts involved in the case at bar. There is one very glaring omission of fact, the inclusion of which is absolutely necessary to a proper decision of the case. In addition to the facts included in the appellant's Statement of the Case, the complaint of the appellee alleged that the coil of pipe sold to Frank Powser (R. 5) had been

discarded from the operating system of the appellant (R. 1). Appellant also omitted from its Statement of the Case that it had admitted in its answer that the coil of pipe in question had been discarded from the operating system of the appellant. The fact that the said coil of pipe had been abandoned at the time of the accident as a part of the industrial operation of the appellant, is a key fact in the case. It should, therefore, be brought to this court's attention that it was a fact which was mutually admitted in the pleadings of the parties hereto.

(b) Evidence

Appellant's statement that there was no substantial controversy in the evidence adduced at the trial as to the manner in which the accident occurred and that there was no substantial controversy that the appellee's vision had been impaired is accurate. However, in summarizing the possibility of the future recovery of the appellee, the appellant in its Statement of the Case neglected to mention that it was conjectural whether appellee's eyesight would be restored to within five or ten per cent of normalcy, inasmuch as statistics showed that surgical operations such as appellee would require to improve his vision are successful in only 50 per cent of the cases in which they have been tried (R.127). Nor did the appellant include the fact that the evidence was clear at the time of the trial that the appellee was classed as industrially blind (R. 121), and that, while appellee might be employable in the future, the type of employment open to him would necessarily be restricted (R. 129).

Appellant stated on page 8 of its brief that the evidence was undisputed that the coil of pipe which was involved in the accident had been retained by appellant as a spare piece of equipment available for use in the event that it became necessary; that it had not been discarded or abandoned as part of the plant equipment until the day that the decision was made to sell it. Appellant's statement is open to question in view of the testimony of appellant's assistant superintendent, Edward Cliffe, who testified that the coil of pipe was in the appellant's scrap pile when he returned from the army (R. 144), which he later stated was in December, 1945 (R. 149).

An additional fact which was brought out by the evidence and which should be called to this court's attention, is that the district court found as a matter of law that the appellee made a valid election to sue the appellant under the Industrial Insurance Act of the State of Washington rather than to take the schedule of payments provided for under the Industrial Insurance Act (R. 274). Such election was not disputed by appellant.

(c) The Verdict

The case was submitted to the jury upon the issues of appellant's negligence, appellee's contributory negligence, and appellee's injuries. The jury returned a verdict in favor of appellee in the sum of $35,000.00, and judgment was entered in accordance with it.

(d) The Question Involved

The sole question presented to this court for re-

view is whether under the undisputed facts admitted in the pleadings and adduced as evidence, it could be found as a matter of law that the appellant company, at the time of the accident involved, was not, with respect to the coil of pipe involved, in the course of extrahazardous employment under the Workmen's Compensation Laws of the State of Washington. If so, appellee had the right under the said Workmen's Compensation Law to maintain this action against appellant and the action of the district court in (1) striking the first affirmative defense of the appellant's answer, (2) sustaining the appellee's objection to appellant's offer of proof of facts in support of its first affirmative defense, (3) refusing to direct the jury to return a verdict in favor of the appellant, and (4) denying appellant's motion for a new trial of the issue raised by appellant's first affirmative defense, must be affirmed.

III. THE ARGUMENT

(a) Summary Statement of Appellee's Position

The appellee had the right to maintain this action under the Workmen's Compensation Law of the State of Washington because the appellant company under the undisputed facts admitted in the pleadings and brought out in the evidence could not possibly have been in the course of any extrahazardous employment with respect to the coil of pipe in question at the time of the accident, inasmuch as appellant had discarded and abandoned the pipe some time before the accident occurred. Appellee contends that an article which has been sold and delivered by a manufacturer

to a buyer can no longer be considered as a part of the extrahazardous employment of the manufacturer and that the liability stemming from the defective and dangerous condition of the article sold is not such a liability against which the manufacturer is immunized by the laws of the State of Washington. The express provision of the Washington statute specifically supports the contention of the appellee.

(b) The Statutes Involved

Remington's Revised Statutes of Washington, Section 7675, which is set out in full in the Appendix on page 25, is the only statute which is involved in this case.

(c) Discussion of Authorities

Appellee brought this action under Remington's Revised Statutes of Washington, Section 7675, which in the portion relevant hereto, provides:

> ". . . That if the injury to the workman is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section . . ."

The appellee was injured due to the negligence of the appellant, Pennsylvania Salt Manufacturng Co. of Washington, by whom he was not employed. Therefore appellee having qualified to do so, elected to sue the appellant in this action as a third party.

The appellant sought to draw over itself a mantle of immunity from suit in this third party action under the Workmen's Compensation Act of the State of Washington, by alleging that the appellee was a workman covered by Washington's Workmen's Compensation Act, that appellant was an employer covered by the same Act, and that at the time of the accident complained of by the appellee, the appellant was in the course of extrahazardous employment under the Act.

Appellant's effort to avoid appellee's suit brings within the scope of this court's inquiry the interpretation of the following clause of Remington's Revised Statutes of Washington, Section 7675, which in the text of the statute immediately follows the portion cited on page 5 hereof, and the application of the said clause to the facts of this case:

> ". . . Provided, however, That no action may be brought against any employer or any workman under this act as a third person if at the time of the accident such employer or such workman was in the course of any extrahazardous employment under this act . . ."

As stated by appellant in its brief, the interpretation of the last quoted clause of Remington's Revised Statutes of Washington, Section 7675, is determinative of the issue involved in this case.

The above proviso has been interpreted by the Supreme Court of the State of Washington several times since its passage by the legislature as a law of Washington in 1929.

The first opportunity the Supreme Court of Wash-

ington had to construe the above proviso of Remington's Revised Statutes of Washington, Section 7675, dealing with third party actions was in *Robinson v. McHugh*, 158 Wash. 157, 291 Pac. 330. In that case a third party-employer who was a contributor to the Industrial Insurance Act was held not subject to suit by an injured workman, because at the time of the accident the third party-employer was engaged in the extrahazardous activity of moving machinery. The defendant-employer was actually moving a heavy gasoline shovel which struck a light post, knocking it, and a ladder which plaintiff had placed against it and ascended, to the ground. The statutorily classified extrahazardous act of moving machinery was the very one which caused the injury and that extrahazardous act took place *at the time of the accident.* Therefore, it followed that the third party-employer qualified under the proviso immunizing him from suit. *Denning v. Quist*, 160 Wash. 681, 296 Pac. 145, presented facts which brought into play exactly the same legal principles as those in *Robinson v. McHugh, supra,* and therefore resulted in a similar decision. In the *Denning* case, the plaintiff, who was a workman employed by a subcontractor on a construction project in which the defendants were the general contractors, was injured on a hoist built and operated by the defendants for the purpose of lifting building materials to the upper stories of the project then under construction. The Supreme Court of Washington held that no third party action lay, because the commission of the alleged wrong took place *at the time of the accident* when defendant was engaged in extrahazardous employ-

ment under the Act, namely, that of constructing buildings.

The facts in both the *Robinson* and *Denning* cases, *supra*, fell squarely within the terms of the proviso. The third party-defendants committed the very acts alleged to have been the negligent ones *simultaneously* with the accident and in the course of extrahazardous employment.

The Supreme Court of Washington next construed the proviso, hereinabove cited, in *O'Brien v. Northern Pacific Railroad Company*, 192 Wash. 55, 72 P.(2d) 602, in which case it laid down the rule that a third party-employer, to qualify under the proviso precluding a third-party suit against him, had not only to be engaged in extrahazardous employment, but such third party-employer had also to be amenable to the Act, and to be a contributor to the accident fund. In the *O'Brien* case a third party action was held to be a proper remedy, as the third party-employer, being engaged as a railroad in interstate commerce, an extrahazardous employment, was not amenable to the Act, did not contribute to the accident fund under the Act, and therefore was not entitled to the benefits of the Act. The case of *Reeder v. Crewes*, 199 Wash. 40, 90P.(2d) 267, following logically the holding in *O'Brien v. Northern Pacific Railroad Company, supra*, held that an injured workman under the Act could sue an employer engaged in extrahazardous employment under the Act at the time of the accident as a third party, if the employer was in default in making payments or in making reports under the Act.

It is stated in *Gephart v. Stout*, 11 Wn.(2d) 184, 118 P.(2d) 801, with reference to the *O'Brien* and *Reeder* cases, *supra*, that:

> "The two last mentioned cases establish the rule that a third party-employer who does not contribute to the industrial insurance fund is subject to suit by a workman, but it does not follow that such an employer who does contribute to the fund is immune."

Pryor v. Safeway Stores, Inc., 196 Wash. 382, 83 P.(2d) 1045, was a case in which the roadsweeper of the plaintiff, who was a workman engaged in extrahazardous employment was run into by a truck negligently driven by an employee of a third party-employer. The third party-employer, although not engaged in extrahazardous employment, had brought itself under the Industrial Insurance Act by the elective adoption provisions thereof, and was in good standing thereunder. The Supreme Court of Washington, in denying the third party-employer immunity from a suit under the Act stated:

> "Plainly, under this limitation an employer under the Act, under the compulsory or elective provisions, is immune from an action in damages for negligent injury of a workman not in his employ only when, 'at the time of the accident' such employer is engaged in 'extrahazardous employment.'
>
> "Since at the time of the collision, the appellants were not engaged in extrahazardous employment, respondent had the right to elect whether he would take compensation under the Industrial Insurance Act or maintain this action for negligence against appellant."

The above quotation from the *Pryor* case, *supra*, forcibly demonstrates that the fact that an employer contributes compulsorily to the Industrial Insurance Fund under the Act is but a condition of immunity from a third party action. There are other required conditions which must also be simultaneously fulfilled so that immunity will be achieved.

It becomes exceedingly clear that for an employer to escape a third party action, it is not enough that he merely be amenable to the Act and not in default thereunder. Following the words of the Supreme Court of Washington, it must also appear that an employer, even under the compulsory provisions, must show that at the time of the accident he was engaged in extrahazardous employment.

Weiffenbach v. Seattle, 193 Wash. 528, 76 P.(2d) 589, presented the following facts: The plaintiff was employed by the Seattle Cornice Works in making estimates and surveying buildings for repair. While engaged in measuring the roof of a building, he was permanently injured by a current of electricity conveyed by a metal tape measure used by him, from a high voltage wire, part of the defendant city's municipal light and power system. The high voltage wire was uninsulated and had negligently been allowed to sag down close to the roof. The plaintiff sued the defendant city as a third party to recover damages.

The sole issue in the case was whether or not the defendant city was in the scope of extrahazardous employment under the Workmen's Compensation Act in respect to the maintenance of the high voltage line causing the accident. In holding that the defendant

city was exempt from suit for the reason that the high voltage transmission line was an integral, existing part of an extrahazardous occupation which the city was carrying on, the Supreme Court of Washington said:

> "Assuming that an employer was engaged in transporting some product, as coal or ore, over a long stretch of tramway, in cars drawn by cables moving from a central plant, and that, in the operation, a workman in another extrahazardous employ was injured, could it be said that, as to this operation the employer was not engaged in employment because no workman of the employer was, at the time, engaged in the operation outside the central plant? *If the city had abandoned the use of the wire for the transmission of electricity so that it was no longer performing any function as a part of its operating system, then, of course, it would be a mere condition within the principle contended for by the appellant* (plaintiff). *It would be then no longer a part of the industry or the extrahazardous employment in which the respondent* (defendant) *was engaged.*" (Italics ours)

The italicized portion of the above quotation from the *Weiffenbach* case, *supra*, fits the instant case exactly.

Attention is called to the fact that in the *Weiffenbach* case, *supra*, the Supreme Court of Washington pointed out that the word *employment* used in the proviso here under discussion is synonymous with *industry*.

Assuming in the instant case that the appellant was a compulsory employer under the Act and not in de-

fault thereunder, the issue in the instant case, like that in the *Weiffenbach* case, *supra*, would be, as stated in the Statement of the Question Involved, simply this: Was the appellant, at the time of the accident, in the course of any extrahazardous employment under the Act?

Appellee's injuries, as shown by the undisputed evidence, were due to burns from sulphuric acid which was loosed from a coil of pipe which the appellant company had sold as scrap iron and which had by such sale been introduced into the stream of commerce (R. 74-85). At the time of the accident—which is the critical point of time insofar as the determination of whether the appellant is to be granted exemption from third party suit under the Act—the coil of pipe containing sulphuric acid had, through the sale, been discarded for some period of time by the appellant (R. 74-85). The appellant admitted that the pipe had been sold prior to the accident, to one Frank Powser as scrap iron and was, insofar as the appellant was concerned, no longer a part of its manufacturing plant (R. 10). Can it then be said that the coil of pipe was part of the extrahazardous employment or industry of the appellant after the appellant had sold and discarded it? Appellee submits that when the appellant sold the coil of pipe to Frank Powser, the pipe was no longer performing a function as a part of appellant's manufacturing system; it was no longer a part of the extrahazardous employment or industry of the appellant.

The statutory proviso here in question sets up the *time of the accident* as the crucial period during which

the third party-employer must be engaged in extrahazardous employment in order to be shielded from a third party action. It is not enough to prove that he was engaged in extrahazardous employment at some other time, or at some other place not connected with the accident.

The Supreme Court of Washington considered the meaning of the word *accident* in *Johnson v. Department of Labor and Industries*, 132 Wash. Dec. 394, 205 P.(2d) 896. It said:

> "See *Stolp v. Department of Labor and Industries*, 138 Wash. 685, 245 Pac. 20, where it was said: 'The accident or fortuitous event happened at the time the respondent struck his eye upon the air compressor pipe. That was the event. The injury which was the result of that accident or event was when the effect was produced and the sight of the eye lost'."

Consequently, in the instant case the *time of the accident* was when the sulphuric acid struck the appellee. It would follow that appellant, to have successfully achieved the immunity to which it claimed to be entitled, had to show that on February 20, 1948, when the accident on which appellee based his action occurred (R. 4, 11, 91) the coil of pipe was being used in appellant's extrahazardous employment. That was a patent impossibility, under the pleadings and under the evidence, inasmuch as appellant admitted that *at the time of the accident* the pipe had been sold and delivered to Frank Powser and was therefore no longer a part of the industry in which appellant was engaged (R. 11, 148). As far as the appellant was concerned, its only relationship to the acid-laden coil of

pipe was that of a vendor of an item of personal property. The appellant had neither title, nor the right to possession, nor actual possession thereof. The appellant had, prior to the accident, introduced the scrap pipe into those channels of business and commercial intercourse into which scrap iron passed when it no longer had use in the industry in which the appellant was engaged. The pipe's relationship to the appellant was no longer industrial; the relationship became, by reason of the sale, purely commercial.

The appellant as the vendor of the coil of pipe then became subject to liability for the dangerous condition of the pipe. This liability sprang from the fact that appellant was a supplier of a chattel. It is completely divorced from the industrial employment of the appellant and is a liability which was created only when the appellant undertook to sell the coil of pipe.

The situation created under the facts of the instant case is analogous to that which was discussed in the landmark case of *McPherson v. Buick Motor Company*, 217 N.Y. 382, 111 N.E. 1050, Ann. Cas. 1916 C, 440, L.R.A. 1916 F, 696, where a manufacturer was held liable to a party who was not its immediate vendee for injuries resulting from the collapse of a defective wheel of an automobile manufactured by it. It is clear that with respect to such an automobile the extrahazardous employment of the manufacturer would cease when it sold the automobile to other parties. It would no longer be a part of the industry of the manufacturer. The manufacturer would owe certain duties to users of the automobile but they would be duties arising from its being a sup-

plier of chattels in a commercial capacity, the manufacturer's industrial connection with the automobile having terminated upon its sale.

If, for example, a manufacturer of matches under the Act, negligently sold defectively made matches to a wholesaler, who in turn sold them to a retailer, who sold them to an employer of a workman under the Act, which workman in the course of his employment struck the match and was injured by the ensuing explosion resulting from the defective manufacture, it becomes quite apparent that insofar as the manufacturer is concerned, the accident was occasioned not in the industrial activity of the manufacturer but in its commercial activity subsequent to the completion of the industrial activity.

The situation is the same here. The appellant is attempting in the instant case to widen the benefits of the Workmen's Compensation Act of the State of Washington to include immunity from liability for its supplying defective chattels. That certainly was not within the contemplation of the legislature of the State of Washington when it enacted its Industrial Insurance Act and subsequent amendments. Liability for products sold is entirely separable from the industrial activity of the manufacturer. To extend the immunity, as contended by appellant, would do violence to the intention of the legislature as expressed in definite terms in the proviso herein under discussion.

Appellant iterates and reiterates that an employer who has complied with the provisions of the Industrial Insurance Act is as a matter of policy entitled to all

of the benefits of the Act. That is indisputable. Appellant errs, however, in assuming that complete immunity from third party suits is granted such an employer as long as it was at the time of the *negligence* engaged in extrahazardous employment. The Act is specific in the terms granting immunity from third party suits; it says that such a benefit will accrue only when *at the time of the accident* the employer was in the course of extrahazardous employment under the Act. It must be presumed from the words of the proviso that the legislature contemplated such a state of facts as are presented in the instant case and was cognizant that industrial activity, with respect to a chattel, ceases when a product is sold and delivered.

Appellant further assumes that the determinative test in each case is not when the accident occurred but when the negligence giving rise to the accident occurred. In the light of the plain wording of the proviso, the only point of time in issue is *the time of the accident.* To sustain the contention of the appellant, the plain words and meaning of the Washington statute must be disregarded. Appellant would have the courts rewrite the proviso in order to widen the benefits and thus pull over itself the mantle of immunity from third party suits in cases of products liability.

Properly analyzed the allegations of negligence of the appellee (R. 7) charge appellant with supplying an inherently dangerous chattel to other persons not cognizant of the danger.

In the instant case the pipe had been sold by the appellant and no longer remained in its hands and therefore could not be considered with respect to it a

part of the industry in which it was engaged. When the coil of pipe was abandoned by sale by the appellant, it was no longer a part of the manufacturing industry and with respect to it the appellant was not in the course of any extrahazardous employment under the Act.

That the *Weiffenbach* case, *supra*, states the correct law of the State of Washington with respect to the point at issue, was established in the very well reasoned case of *Gephart v. Stout*, *supra*. In the *Gephart* case, the plaintiff making deliveries by motorcycle was engaged in extrahazardous employment under the Act at the time of the injury. The defendant was the owner of a freight transportation business, also classified as extrahazardous. The defendant's automobile collided with the plaintiff's motorcycle, causing him the injuries, compensation for which was sought in the action. The Supreme Court of Washington reviewed the cases hereinbefore cited, and in holding in favor of the plaintiff (respondent) stated:

> "While the foregoing cases are not directly in point, they do clearly establish two essential requirements which an employer must meet to entitle him to immunity from suit by a workman not in his employ: (1) The employer must be a contributor to the workmen's compensation fund; and (2) *at the time of the accident*, the employer must be in the course of some extrahazardous employment under the industrial insurance act. To satisfy the second requirement, the negligent act or omission which is the basis of the workman's cause of action must arise out of, or be in some way connected with, an extrahazardous employment or business *then* being carried on by

the employer. We do not think the legislature intended, by the statutory proviso in question, to grant to every individual who may happen to own an extrahazardous business or a business having some extrahazardous phase, a blanket immunity from suit as a third party employer for his personal negligence at all times, in all places, and in connection with all activities in which he may engage.

"In the present case, the appellant was not in the course of any extrahazardous employment at the time of the accident. The respondent, therefore, had the right, as he elected to do, to seek his remedy by suit against appellant rather than take the benefits provided by the workmen's compensation act." (Italics ours)

A significant act of the Supreme Court of Washington in its *Gephart* decision was that it quoted the following excerpt from the *Weiffenbach* case and the court italicized those portions here italicized:

"Assuming that an employer was engaged in transporting some product, as coal or ore, over a long stretch of tramway, in cars drawn by cables moving from a central plant, and that, in the operation, a workman in another extrahazardous employ was injured, could it be said that, as to this operation, the employer was not engaged in employment because no workman of the employer was, at the time, engaged in the operation outside the central plant? *If the city had abandoned the use of wire for the transmission of electricity so that it was no longer performing any function as a part of its operating system, then, of course it would be a mere condition within the principle contended for by the appellant* (plaintiff). *It would be then no longer*

a part of the industry or the extrahazardous employment in which the respondent (defendant) *was engaged.*"

Another portion of the *Gephart* case reads as follows:

"In *Lunday v. Department of Labor and Industries*, 200 Wash. 620, 94 P.(2d) 744, the plaintiff claimed a widow's pension under the workmen's compensation act, and the principal question was whether or not her husband was a workman within the meaning of the act. He had been working as a grocery clerk, not an extrahazardous employment, but part of his time was spent assisting in making deliveries for his employer. He was fatally injured at the end of a trip on a delivery truck which carried both meat and groceries. Because of certain circumstances of that case, which we shall not detail here, the delivery of meat was considered to come within the extrahazardous category, and it was held that, in the particular time of the accident, both he and his employer were engaged in extrahazardous employment. The implication of the decision is that both employer and employee may be subject to the act as to one extrahazardous phase of a business, but not subject to it as to another nonextrahazardous phase of the same business."

The appellant in its brief glosses over the words of the Supreme Court of the State of Washington in the case of *Weiffenbach v. Seattle*, *supra*, when the court was contemplating a situation exactly as presented by the case at bar. The statement of the Washington court is clear and explicit. It is not an off-hand statement as is evidenced by the fact that in the case of *Gephart v. Stout*, *supra*, the Washington court re-

affirmed its statement in the *Weiffenbach* case by italicizing the following words:

> "* * * *If the city had abandoned the use of the wire for the transmission of electricity so that it was no longer performing any function as a part of its operating system, then of coures it would be a mere condition within the principle contended for by the appellant* (plaintiff). *It would be then no longer a part of the industry or extrahazardous employment in which the respondent* (defendant) *was engaged.*"

Then appellant attempts to draw a distinction between the negligence of a city in allowing a dangerous condition to exist with regard to a piece of wire abandoned as a part of the city's lighting system and the negligence of the appellant in creating a dangerous condition and allowing it to exist by injecting into regular commercial channels a coil of pipe which appellant had sold and discarded as a part of its industrial operation. There is no difference. To attempt to create one is sheer sophistry. The situation is exactly the same.

Appellant on page 31 of its brief stated that the force of the *Weiffenbach* case, *supra*, must be considered as having been dissipated by the language of the Washington Supreme Court in the case of *Boeing Aircraft Company v. Department of Labor and Industries*, 22 Wn.(2d) 423, 156 P.(2d) 640. The statement is erroneous and the quotation is misleading for the reason that the full text thereof was not included. It should be read with the fuller quotation appearing on page 18 of appellant's brief. In the quota-

tions cited by the appellant the Washington Supreme Court was not concerned with an interpretation of the proviso under discussion here. It was solely concerned with the problem of determining which of two industries contributing to the Industrial Accident Fund would absorb the charges for losses due to an accident which was unquestionably an industrial accident. The Washington court merely stated that a contributor to the Industrial Insurance Fund is entitled to all the benefits conferred by the statute. The question of whether immunity from suit existed under circumstances like those of the instant case was not before the court.

In *Burns v. Johns*, 125 Wash. 387, 216 Pac. 2, the Washington Supreme Court said:

> "The right of election is a valuable right to the workman and, to secure it to him, the act should receive the same liberal construction that is required to be given to other parts of the act in order to secure his rights thereunder."

IV. SUMMARY AND CONCLUSION

Appellee respectfully submits that the provisions of the Workmen's Compensation Law of the State of Washington specifically establish and the decisions of the Supreme Court of Washington consistently reaffirm the following propositions of law:

1. That a workman engaged in extrahazardous employment who is injured due to the negligence of another employer, who is covered by the Act, has the right to elect whether to sue the other employer, unless *at the time of the accident* the other employer was in

the court of extrahazardous employment under the Act.

2. That *the time of the accident* is the moment at which the fortuitous event resulting in injury occurred and is different and distinct from the time of the negligence.

3. That when an employer has discarded or abandoned a chattel or a piece of equipment, the said chattel or piece of equipment can no longer be said to be a part of the extrahazardous employment of the employer.

4. That a workman engaged in extrahazardous employment, who is injured due to the inherently dangerous nature of a chattel which another employer covered by the Act had discarded and sold to other parties prior to the time of the accident, has the right of electing whether to take under the schedule of payments provided by the Act or to sue the other employer as a third party under the terms of the Act. The reason for allowing such election is that the offending chattel at the time of the accident could not possibly, after sale, be considered part of the extrahazardous employment of the employer.

Therefore, appellee respectfully submits that acts of the District Court in (1) striking the first affirmative defense of the appellant's answer (2) sustaining the appellee's objection to appellant's offer of proof of facts in support of its first affirmative defense (3) refusing to direct the jury to return a verdict in favor of the appellant, and (4) denying appellant's motion for a new trial of the issue raised by appellant's first

affirmative defense should be upheld and the judgment of the District Court affirmed.

Respectfully submitted,

MASLAN, MASLAN & HANAN,
Attorneys for Appellee.

APPENDIX

Remington's Revised Statutes of the State of Washington, Section 7675, provides as follows:

"In the sense of this act words employed means as here stated, to-wit:

"Factories mean undertakings in which the business of working at commodities is carried on with power-driven machinery, either in manufacture, repair or change, and shall include the premises, yard and plant of the concern, except when otherwise expressly stated.

"Workshop means any plant, yard, premises, room or place wherein power-driven machinery is employed and manual labor is exercised by way of trade for gain or otherwise in or incidental to the process of making, altering, repairing, printing or ornamenting, finishing or adapting for sale or otherwise any article or part of article, machine or thing, over which premises, room or place the employer of the person working therein has the right of access or control, except when otherwise expressly stated.

"Mill means any plant, premises, room or place wherein machinery is used, any process of machinery, changing, altering or repairing any article or commodity for sale or otherwise, together with the yards and premises which are a part of the plant, including elevators, warehouses and bunkers, except when otherwise expressly stated.

"Mine means any mine where coal, clay, or mineral, gypsum or rock is dug or mined underground.

"Quarry means an open cut from which coal is mined, or clay, ore, mineral, gypsum, sand, gravel or rock is cut or taken for manufacturing, building or construction purposes.

"Enginering work means any work of construction, imporvement or alteration or repair of buildings, structures, street, highways, sewers, street railways, railroads, logging roads, interurban railroads, harbors, docks, canals, electric, steam or water power plants, telegraph and telephone plants and lines, electric light or power lines, and includes any other works for the construction, alteration or repair of which machinery driven by mechanical power is used, except when otherwise expressly stated.

"Except when otherwise expressly stated, employer means any person, body of persons, corporate or otherwise, and the legal personal representatives of a deceased employer, all while engaged in this state in any extrahazardous work, by way of trade or business, or contracts with one or more workmen, the essence of which is the personal labor of such workman or workmen, in extrahazardous work.

"Workman means every person in this state, who is engaged in the employment of any employer coming under this act whether by way of manual labor or otherwise, in the course of his employment: *Provided, however*, That if the injury to a workman is due to the negligence or wrong of another not in the same employ, the injured workman, or if death result from the injury, his widow, children, or dependents, as the case may be, shall elect whether to take under this act or seek a remedy against such other, such election to be in advance of any suit under this section; and if he takes under this act, the cause of action against such other shall be assigned to the state for the benefit of the accident fund; if the other choice is made, the accident fund shall

contribute only the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensations provided or estimated by this act for such case: *Provided, however*, That no action may be brought against any employer or any workman under this act as a third person if at the time of the accident such employer or such workman was in the course of any extrahazardous employment under this act. Any such cause of action assigned to the state may be prosecuted or compromised by the department, in its discretion. Any compromise by the workman of any such suit, which would leave a deficiency to be made good out of the accident fund, may be made only with the written approval of the department.

"Any individual employer or any member or officer of any corporate employer who shall be carried upon the payroll at a salary or wage not less than the average salary or wage named in such payroll and who shall be injured, shall be entitled to the benefit of this act as and under the same circumstances, and subject to the same obligations, as a workman: *Provided*, That no such employer or the beneficiaries or dependents of such employer shall be entitled to benefits under this act unless the director of labor and industries prior to the date of the injury has received notice in writing of the fact that such employer is being carried upon the payroll prior to the date of the injury as the result of which claims for a compensation are made.

"Dependent means any of the following named relatives of a workman whose death results from any injury, and who leave surviving no widow, widower, or child under the age of eighteen years,

viz.: Invalid child, father, mother, grandfather, grandmother, stepfather, stepmother, grandson, granddaughter, brother, sister, half-sister, half-brother, niece, nephew, who at the time of the accident are actually and necessarily dependent in whole or in part for their support upon the earnings of the workman. Except where otherwise provided by treaty, aliens other than father or mother, not residing within the United States at the time of the accident are not included. A dependent shall at all times furnish to the director of labor and industries proof satisfactory to the director of labor and industries of the nature, amount and extent of the contribution made by such deceased workman.

"Beneficiary means a husband, wife, child or dependent of a workman in whom shall vest a right to receive payment under this act.

"Invalid means one who is physically or mentally incapacitated from earning.

"The word 'child' as used in this act, includes a posthumous child, stepchild, a child legally adopted prior to the injury and an illegitimate child legitimated prior to the injury.

"The word 'injury' as used in this act means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical condition as results therefrom.

"The term 'educational standard' shall mean such standards as the supervisor of safety shall make for the purpose of educating and training both employer and workman in the appreciation and avoidance of danger, and in the maintenance and proper use of safe place and safety device standards."